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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GENARO ARTURO HERNANDEZ, Defendant and Appellant.	E047820 (Super.Ct.No. SWF020268) **OPINION**

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge. Affirmed.

Dennis P. O'Connell for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

During a camping trip, defendant arranged to sleep in the same bed with John Doe 1, then aged 15. During the night, he touched Doe 1's penis, then Doe 1's buttocks.

Evidence was introduced that he had previously engaged in similar sexual touching of three other boys (including Doe 1's brother).

As a result, defendant was convicted on two counts of a lewd act on a child aged 14 or 15 where the defendant is at least 10 years older than the child (Pen. Code, § 288, subd. (c)(1)), and he was sentenced to a total of three years eight months in prison.

Defendant now contends:

1. The trial court erred by admitting evidence of defendant's prior sexual offenses.

2. The jury instruction regarding evidence of prior sexual offenses (Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 1191) was erroneous.

3. The trial court erred by refusing to give defendant's proposed amended modification of CALCRIM No. 1191.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Charged Offense*.

By the time of trial, John Doe 1 was 17 years old. When he was growing up, his parents were not around much. His father was "[i]n and out" of jail or prison and his mother used drugs. From time to time, he lived with his adult cousin, Cindy T.

Defendant was a friend of Doe 1's grandmother (who was also Cindy's grandmother). Defendant was like an uncle or even a father to Doe 1. Doe 1 and his brothers went to visit defendant at his home, sleeping over for up to a week at a time. At

his home, defendant had a basketball court, dirt bikes, games, and a computer. Defendant bought Doe 1 and his brothers whatever they wanted — "Play [S]tations, cellular phones, [iP]ods, radios, clothing, jewelry, food, CDs, toys, a lot of things."

On August 25, 2006, defendant took Doe 1 and eight other teenagers (all aged between 10 and 20) on a camping trip to Lake Perris. At the time, Doe 1 was 15. Originally, defendant had asked to take just Doe 1 and some of his brothers. Cindy had agreed, but only on the condition that her sons go, too. She wanted to go along herself, but defendant told her the campground was full, so she did not arrive until the next morning.

That night, Doe 1 was going to sleep in defendant's RV, which had three beds. He wanted to sleep with his sister, but defendant insisted that Doe 1 sleep with him. Sometime during the night, Doe 1 awoke to find defendant touching his penis. Defendant then touched Doe 1's "butt," in an effort to pull down his pants. Doe 1 tried to pull his pants back up. He was shocked and embarrassed, "because there was family in there." Eventually, defendant stopped, and Doe 1 went back to sleep.

The next morning, when Cindy arrived, Doe 1 was "clinging"; he would not let go of her arm. He asked if he could sleep with her that night. When she told defendant that Doe 1 was going to sleep with her, defendant got upset. They got into an argument. As a result, Cindy left, taking Doe 1 and all of the other young people with her. After they had dropped everyone else off, Doe 1 told Cindy what defendant had done. He was upset and crying.

At trial, Doe 1 testified that defendant had touched his private parts two or three times before. However, he had not told the police this.

B. *Evidence of Prior Sexual Offenses*.

1. *John Doe 2*.

John Doe 2 was defendant's nephew. By the time of trial, he was 29 years old. He testified to events that took place when he was 12 or 13 and living with defendant. He had lived with defendant for about five years. Defendant had "a lot of money."

At night, when Doe 2 was sleeping, defendant would come into his bedroom and grab his penis. Meanwhile, defendant would masturbate. Doe 2 admitted that he did not see defendant masturbating, but, he testified, "[W]hen you're sleeping next to him you know what he's doing with his hands." Doe 2 would try to turn away. This happened "[m]ultiple times."

At the time, Doe 2 did not tell anyone about it. He was "too scared to say anything." The next day, he would "just pretend it didn't happen . . . ."

After Doe 2 moved out, he continued to visit defendant's home. Sometimes he saw Doe 1 there. By the time of trial, he testified, " . . . I don't feel anything bad about [defendant] or anything good. . . . [I]t's neutral."

2. *John Doe 3*.

At the time of trial, John Doe 3 was 26 years old. He testified to events that took place when he was a child, around the time the movie *Pocahontas* came out.[1]

Defendant was a friend of Doe 3's family. Doe 3 went to defendant's house with his family "many times." Defendant had cable TV, a Nintendo, and dirt bikes. Sometimes Doe 3 saw Doe 2 there.

On one occasion, defendant took Doe 3 fishing. That night, after the fishing trip, Doe 3 slept overnight at defendant's house. Nobody else was there. He bedded down on the living room floor, lying on his side. Defendant lay down on the floor behind him. Doe 3 could feel defendant's erect penis "poking him in the butt" over his clothes. Defendant pulled down Doe 3's shorts, but Doe 3 pulled them back up.

Doe 3 went to another room and lay down on a mattress on the floor, but defendant followed him, "still trying to do the same thing." Doe 3 did not tell defendant to stop because he was by himself and he did not want to "fear for [his] life." Eventually, defendant gave up and left. The next morning, defendant said he would buy Doe 3 a Super Nintendo.

At the time, Doe 3 did not tell anyone what had happened; he was "embarrassed" and did not think his parents would believe him. He went to defendant's house again, but

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[1] No further evidence of this date was introduced. However, as the jurors may have known, *Pocahontas* came out in 1995. (<http://www.imdb.com/title/tt0114148>, as of Mar. 1, 2010.) Thus, Doe 2 was roughly 13.

he never stayed there alone. By the time of trial, he was still "angry about what happened."

3. *John Doe 4.*

John Doe 4 was Doe 1's older brother. At the time of trial, he was 24 years old. When he was growing up, his family was poor. He lived with his grandmother and grandfather. His mother was in jail "off and on." He never met his father. At the time of trial, he was in prison, serving a life sentence for attempted murder. He admitted that he had been "involved with a gang."

Doe 4 first met defendant when he was eight or nine. A couple of days later, defendant invited him to stay overnight at his ranch. It had a big backyard and "cool" things like a Nintendo.

Doe 4 played video games until he fell asleep. When he woke up, defendant was lying with him. Doe 4 testified, "I don't know if I was dreaming or not, but I thought he was touching me." Defendant touched Doe 4's penis and "butt." Doe 4 told defendant to stop. Defendant said Doe 4 was just sleeping and told him to go back to sleep.

Doe 4 did not tell anybody what had happened because he was "embarrassed."[2] He still liked defendant; he regarded him as "a big uncle or big brother . . . ." Defendant "took [him] out, bought [him] stuff, always took [him] shopping, always gave [him]

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[2] Cindy T. testified that Doe 4 once "mentioned something" about defendant touching him but "he didn't know if it was a dream." However, she told police that Doe 4 had told her about the molestation a few months before trial.

money." He continued to visit defendant's house on weekends and in the summer. He explained, "I never had someone that showed us so much love and bought us stuff." However, when he was at defendant's house, defendant would "embrace" him in a way that "g[a]ve [him] the creeps . . . ." Later, Doe 1 started visiting along with Doe 4. Defendant took both Doe 4 and Doe 1 to Las Vegas.

Doe 4 also testified to an incident in which defendant said he wanted to show him how to drive. Defendant had Doe 4 sit on his lap and hold the steering wheel. Defendant "was grabbing [his] leg . . . and gripping [his] thighs . . . ." Doe 4 "felt uncomfortable." He tried to get away, but defendant told him to "just hold the steering wheel."

C. *Defense Evidence*.

Defendant's wife testified that Cindy's mother (Doe 1 and Doe 4's aunt) had asked defendant to lend her $4,000, but defendant had refused.

II

EVIDENCE OF PRIOR SEXUAL OFFENSES

Defendant contends that the trial court erred by admitting evidence of his prior sexual offenses.

A. *Additional Factual and Procedural Background*.

The prosecution filed a written motion in limine, seeking leave to introduce evidence that defendant had molested Doe 2, 3, and 4. Defense counsel objected that the prior offenses were prejudicial. He argued that they were remote and not similar to the current offenses.

The trial court admitted the evidence as propensity evidence under Evidence Code section 1108.[3] It explained: "[T]here appear to be more similarities than not." "[T]he [sexual] conduct as to these three boys is similar. . . . It does appear that these boys did not have a father figure. Their mother was not a strong presence. It does appear that the children may have been poor, and it does appear that the children at the time were about the same age." "[T]he acts are occurring . . . while the children are away from their home. The defendant is sleeping with them. These are seven- and eight-year-old kids. [¶] I think it's one thing to sleep with a two-year-old. It's quite another thing to sleep with a seven- or eight-year-old."

It further found: "[I]t does not appear to me that allowing this evidence would create a substantial danger of undue prejudice in that [defense counsel] would be allowed to cross-examine each of these John Does. . . . [¶] Additionally, there is a jury instruction, which the Court will be giving, which I think also tends to protect the [d]efense in this case."

B. *Analysis*.

"[U]nder [Evidence Code] section 1101, subdivision (a), 'propensity' evidence is generally inadmissible." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056, fn. omitted.) However, Evidence Code section 1108 creates an exception. It provides, as relevant here:

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[3] It also admitted the evidence under Evidence Code section 1101, subdivision (b), as relevant to motive and intent. Ultimately, however, the jury was instructed that it could consider the evidence only as evidence of defendant's propensity to commit a sexual offense, and not for any other purpose. (See part III.A, *post*.)

"In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

"Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

"This court reviews the admissibility of evidence of prior sex offenses under an abuse of discretion standard. [Citation.] A trial court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

Here, the evidence of other sexual offenses had significant probative value. "[T]he probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses . . . ." (*People v. Falsetta, supra,* 21 Cal.4th at p. 917.) As the trial court noted, the prior offenses had significant similarities to the

current offenses. The victims were all young boys, between about 8 and 15, respectively. Three out of four of them were not living with their parents. Defendant invited them to stay with him, luring them with video games and fishing opportunities. He waited until they were sleeping; then he lay down with them and either fondled their penises or rubbed his penis against their buttocks. Afterwards, he gave several of them lavish gifts.

On the other hand, the evidence was not unduly prejudicial. Precisely because the prior offenses were similar to the current ones, they were not particularly inflammatory. Moreover, "[t]he jury was given an effective instruction by the trial court to consider the evidence only for proper limited purposes, and we must presume the jury adhered to the admonitions. [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1277.)

Defendant argues that the prior offenses were remote. However, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) The prior offenses were committed between roughly 11 and 15 years before than the current offenses. It is not unreasonable that a propensity to commit sexual offenses against male children could persist for at least this long. Indeed, defendant concedes that "[b]y itself [remoteness] may not mandate exclusion of the evidence."

Defendant also argues that there was no evidence that he had been convicted as a result of any of the prior offenses. It has been held that "the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to

punish him for the other offenses . . . ." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) However, it is also reduced somewhat if, as here, the jury simply is not told whether the prior offense resulted in a conviction or not. (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [Fourth Dist., Div. Two].) In any event, a prior offense that did not result in a conviction is not inadmissible per se. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) We cannot say that it fell "outside the bounds of reason" to conclude that the substantial probative value of the evidence outweighed this entirely speculative prejudicial effect.

Defendant argues that the testimony of Doe 4 was not sufficiently probative because he admitted that he might have been dreaming. If the jury found that to be true, however, then presumably his testimony also was not prejudicial.

Similarly, defendant argues that the incident in which defendant had Doe 4 sit on his lap, supposedly so he could teach him to drive, was not probative because "there was no evidence of any lustful intent on the part of [defendant] during that incident." "Because intent for purposes of Penal Code section 288 can seldom be proven by direct evidence, it may be inferred from the circumstances. [Citation.]" (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 440.) Here, Doe 4 testified that during this incident, defendant was "grabbing" his leg and thigh. He felt uncomfortable, but defendant would not let him go. When these actions are viewed in combination with defendant's ongoing bribery and creepy hugging (to say nothing of his prior molestation) of Doe 4, a jury could reasonably infer that defendant acted with the requisite sexual intent. (*People v. Mullens* (2004) 119

Cal.App.4th 648, 662 [touching 14-year-old victim's thigh, in context of hugging, flirtation, and secrecy, was sufficient evidence of sexual intent].)

We therefore conclude that the trial court did not abuse its discretion by admitting the evidence of prior sexual offenses under Penal Code section 1108.

III

THE INSTRUCTION REGARDING EVIDENCE OF PRIOR SEXUAL OFFENSES

Defendant contends that CALCRIM No. 1191, regarding evidence of prior sexual offenses, as given to the jury in this case, was erroneous. Alternatively, he contends that the trial court erred by refusing to give his proposed amended version of CALCRIM No. 1191.

A. *Additional Factual and Procedural Background.*

The prosecution requested CALCRIM No. 1191 (Evidence of Uncharged Sex Offense). This instruction, as ultimately given in this case, provides:

"The People presented evidence that the defendant committed the crime of lewd and lascivious act on a child that was not charged in this case. These crimes are defined for you in these instructions. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses.

"Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met

this burden of proof, you must disregard this evidence entirely. If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses and, based on that decision, also conclude that the defendant was likely to commit and did commit lewd and lascivious acts on a child as charged here.

"If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the lewd and lascivious act on a child. The People must still prove each charge beyond a reasonable doubt. Do not consider this evidence for any other purpose."

Defense counsel objected; he asked that the instruction be amended so as to begin, "The People presented evidence that the defendant committed the crime of lewd and lascivious act on a child that was not charged in this case *or in any other case anywhere else*." (Italics added.) He argued that this would make it "clear . . . that no charges have been filed against my client," and thus "would reduce the prejudicial effect" of the evidence. The trial court refused to do so.

Thereafter, defense counsel filed a written motion to use a special instruction instead of CALCRIM No. 1191. He argued that CALCRIM No. 1191 was unconstitutional because "it permits the jury to find the defendant guilty based merely on proof by a preponderance of the evidence that the defendant committed a prior similar act."

Defense counsel's proposed special instruction provided:

"Before you may rely on the uncharged offense to find defendant guilty of the charged Penal Code Section 288(c) you must first determine whether the uncharged offense allegation is an essential part of the prosecution's case.

"If the uncharged offense allegation is essential to the conclusion that the defendant is guilty of the charged Penal Code Section 288(c) you may not rely on the uncharged offense unless you first find beyond a reasonable doubt that the defendant committed the uncharged offense.

"Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

After hearing argument, the trial court denied the motion. Accordingly, it instructed the jury with CALCRIM No. 1191.

B. *The Constitutionality of CALCRIM No. 1191.*

Defendant argues that CALCRIM No. 1191 unconstitutionally lowers the prosecution's burden of proof because it allows the jurors to "convict the [defendant] if they conclude he committed he prior bad acts by a preponderance of the evidence."

In *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016, the California Supreme Court rejected a similar challenge to CALJIC No. 2.50.01. It explained: "Defendant complains that, having found the uncharged sex offense true by a preponderance of the evidence, jurors would rely on 'this alone' to convict him of the charged offenses. The

problem with defendant's argument is that the instruction nowhere tells the jury it may rest a conviction solely on evidence of prior offenses. Indeed, the instruction's *next sentence* says quite the opposite: "if you find by a preponderance of the evidence that the defendant committed a prior sexual offense . . . , that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.'" (*Id*. at p. 1013.) It also noted that the jury was otherwise correctly instructed regarding the requirement that every element of the charged offense be proved beyond a reasonable doubt. (*Id*. at pp. 1013-1016.) It concluded: "[N]o juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense." (*Id*. at p. 1015.)

The version of CALJIC No. 2.50.01 that was at issue in *Reliford* is not materially different from CALCRIM No. 1191. Accordingly, other courts, citing *Reliford*, have rejected identical challenges to CALCRIM No. 1191. (*People v. Cromp* (2007) 153 Cal.App.4th 476, 480 [Third Dist.]; *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [Third Dist.].) We reject it likewise here.

C. *Defendant's Requested Modification to CALCRIM No. 1191*.

Defendant also argues that the trial court should have given his requested modification to CALCRIM No. 1191 — i.e., it should have specified that defendant had not been charged with prior sexual offenses in this case "or in any other case anywhere else." The People misunderstand this contention as referring to defendant's requested special instruction; thus, they argue that his requested special instruction was erroneous.

However, they never address his requested modification. Nevertheless, based on our independent analysis, we reject defendant's contention.

Instructions "must deal with the law, not with facts." (5 Witkin, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 606 at p. 865.) At the same time, "[a] trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.)

Here, defense counsel was essentially asking the trial court to instruct the jury on a matter of evidence, not a matter of law. The parties themselves had not introduced any evidence one way or the other as to whether defendant had been charged in connection with the prior bad acts. Accordingly, there was no substantial evidence to support the requested modification.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.